

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Subscriber Carrier)
Selection Changes Provisions of the)
Telecommunications Act of 1996)
)
Policies and Rules Concerning)
Unauthorized Changes of Consumers')
Long Distance Carriers)
)

CC Docket No. 94-129

REPLY COMMENTS OF CABLE AND WIRELESS, INC.

I. INTRODUCTION

Cable and Wireless, Inc. ("CWI") hereby files Reply Comments pursuant to §§1.415 and 1.419 of the Commission's Rules, 47 CFR §§1.415, 1.419, in response to the Further Notice of Proposed Rulemaking, CC 94-129, ("FNPRM") released by the Commission on July 15, 1997 in the above-captioned proceeding. CWI is one of the nation's largest interexchange service providers and is now licensed to provide local telecommunications service in more than ten states.

CWI takes this opportunity to reiterate the arguments made in its Comments filed in this proceeding. Congress enacted §258 in the Communications Act of 1996 in order to prevent illegal PC changes by any carrier, in order to make those consumers harmed by such behavior financially whole, and to create a system where an unauthorized carrier is not rewarded for

engaging in illegal, anticompetitive behavior. CWI addressed several issues proposed in the FNPRM which it believed could actually be more harmful than beneficial in the Commission's efforts to prevent slamming. The premium reimbursement proposal, the consumer nonpayment option, and the unauthorized carrier's responsibility for costs incurred by the properly authorized carrier were all opposed since they could create increased incentives to engage in slamming or be slammed and could result in the Commission dedicating additional resources to resolve disputes between carriers or between carriers and consumers. CWI expressed support of the Commission's bright line test for changes in a reseller's underlying carrier and the application of these rules to the local exchange and IntraLATA toll markets.

In the Reply Comments, CWI specifically addresses three issues in this proceeding. First, CWI and several other interested parties strongly recommend the Commission provide increased scrutiny of the ILECs in this area due to their dominant position in their respective markets and their responsibility as executing carriers. Second, many commenters agreed with CWI and urged the Commission to abandon its consumer nonpayment option. Consumers should be required to pay for telecommunications services received due to an illegal PC change in an amount no greater than that which they would have paid for similar services from the properly authorized carrier. To do otherwise would create an incentive for some to abuse the system by not reporting the change or by increasing usage during this time period. Third, CWI believes the Commission should strongly consider exercising its preemption authority under §258. State commissions must dedicate their limited resources to the local market where actual and potential anticompetitive behavior is more widespread than in the interexchange market.

II. ILEC_s SHOULD BE SUBJECT TO A HIGHER DEGREE OF REGULATORY SUPERVISION.

In its Comments to this proceeding and Statement in Support of MCI's Petition for Rulemaking,¹ CWI urged the Commission to increase its regulatory oversight of ILECs due to their dominant position in their respective markets. The ILECs have a dominant market share in the local exchange and IntraLATA toll market and have not been subject to a significant competitive threat. In their quest to enter the InterLATA market, the ILECs must provide access to their networks and be subject to actual and/or potential competition from CLECs. The ILECs will have the ability to maintain their market share by acting anticompetitively through numerous means, including, but not limited to, PC freezes and delays in the implementation of local exchange and IntraLATA toll carrier switches to competitive providers.

Numerous interested parties addressed the issues of the ILECs abusing their market power and dual role as market element and market participant. AT&T agreed that the Commission should apply PC change rules to all carriers and urged the Commission to enhance its regulatory oversight of the ILECs for many of the reasons mentioned by CWI. CWI supports AT&T's request that the ILECs be prohibited from performing an "independent verification" of PC change requests since these verifications can be used anticompetitively to delay requests of switches to CLECs while providing the ILECs with an opportunity to solicit these customers.² The Competitive Telecommunications Association ("CompTel") also stated the Commission should focus its attention on eliminating and preventing ILECs from gaming the PC selection process. Specifically, CompTel suggested the Commission should require the ILECs provide PC change

¹ See CWI Statement in Support of Petition for Rulemaking, CCB/CPD 97-19.

² AT&T Comments at 1-4.

information the same protection as customer proprietary network information, and, in no case, should the ILECs' marketing or sales personnel be permitted access to PC change verification information.³ CWI agrees with CompTel and requests the Commission provide this protection in its final Order.

Several commenters argued the Commission should apply its regulations in a manner consistent with a level playing field where all carriers, regardless of market power, would be equally subject to these rules. This equality of oversight completely disregards the fact that the ILECs are dominant in their respective markets; the Commission has held, in the Bell Operating Companies' recent applications to provide InterLATA service, that the local exchange market has not been open to effective competition; and the ILECs will have a dual role when executing PC changes in their markets. While the comments of several local exchange carriers and their trade association, the U.S. Telephone Association ("USTA"), present logical arguments which request the Commission regulate in a competitively neutral manner, they disregard the fact that not only do the ILECs have the potential to use PC changes anticompetitively, but one ILEC has already been accused of engaging in such activity.⁴

III. CONSUMERS SHOULD BE LIABLE FOR SERVICES RENDERED.

In its comments to the FNPRM, CWI urged the Commission to finalize a rule which would not provide any unintended incentives to cause or be slammed. One specific area mentioned in the Comments was the proposal by the Commission which was supported by several state commissions and consumer organizations where a consumer who has been slammed would

³ CompTel at 5.

⁴ See Plaintiff's Complaint, MCI Telecommunications Corporation v. Southern New England Telecommunications Corporation, Civ. No. 397CV00810 (D. Conn. Apr. 29, 1997).

not be liable for costs due to service rendered by the unauthorized carrier. CWI requested the Commission finalize a rule where the consumer must pay an amount equal to that which the consumer would have paid for the same service if it had been provided by the properly authorized carrier, and CWI suggested if the consumer refused payment the properly authorized carrier would have creditor powers and termination of service as an available remedy. CWI's proposal would make the properly authorized carrier whole while not providing any opportunity for some consumers to receive a slamming benefit by increasing service usage during this period or delaying the report of the unauthorized PC change.

Several other parties to this proceeding recognized the possible harm of a rule which would relieve consumers of all liability for services incurred. USTA,⁵ AT&T,⁶ CompTel,⁷ Cincinnati Bell,⁸ SouthWestern Bell,⁹ and GTE,¹⁰ among others, urged the Commission to require consumers pay at least that which they would have owed to the properly authorized carrier for similar services. Such a requirement would place the properly authorized carrier, the unauthorized carrier and the consumer in a situation as if the unauthorized PC change had never occurred.

Several other parties, however, did support the Commission on this issue and urged a final rule where the consumer would not be liable for services rendered. Bell Atlantic,¹¹ the Ohio Consumers' Counsel,¹² the National Association of Attorney Generals,¹³ the New York State Department of Public Service,¹⁴ and the North Carolina Public Staff Utilities Commission,¹⁵

⁵ USTA at 10.

⁶ AT&T at 8.

⁷ CompTel at 11.

⁸ Cincinnati Bell at 6.

⁹ SouthWestern Bell, Pacific Bell and Nevada Bell at 11.

¹⁰ GTE at 14.

¹¹ Bell Atlantic at 3.

¹² Ohio Consumers' Counsel at 3.

¹³ National Association of Attorney Generals at 5.

¹⁴ New York State Department of Public Service at 11.

among others, all urged the Commission to provide such an option to consumers. While CWI recognizes the consumer protection policy to these arguments, the argument of potential fraud and abuse should not be equated to urging the Commission "...not to pour water on fire for fear of drowning."¹⁶ Requiring payment for these services would not reward the unauthorized carrier or create an incentive to slam, as argued by the Ohio Consumers' Counsel,¹⁷ since §258 requires the unauthorized carrier forward all funds collected from the subscriber to the properly authorized carrier.

CWI supports a rule where the consumers are made whole, unauthorized carriers are not rewarded in any manner for their actions, and properly authorized carriers are not financially harmed. Fraud in telecommunications usage and billing is a reality, and a policy which inadvertently encourages a potential increase in fraudulent behavior will increase the cost of providing service and will be passed on to all customers through higher rates. CWI urges the Commission to adopt a final rule where consumers are liable for services received in an amount equal to what they would have paid had they not been slammed.

IV. THE COMMISSION SHOULD EXERCISE ITS PREEMPTION AUTHORITY.

In its comments, CWI urged the Commission to recognize and exercise its preemption authority under §258 of the Communications Act. While §258 does include a specific negative preemption which saves state commission actions intended to prevent intrastate illegal PC switches, the statute does not preclude the Commission from preempting state substantive laws in the intrastate area and state commission actions which address illegal PC switches in the interstate

¹⁵ North Carolina State Public Staff Utilities Commission at 5-6.

¹⁶ Id.

¹⁷ Ohio Consumers' Counsel at 3.

area. CWI argued preemption not only would provide carriers and consumers with uniform rules which can be employed in preventing slamming, but preemption would allow state commissions to dedicate their limited resources to combat anticompetitive activity in the local exchange and IntraLATA toll markets.

Several commenters expressed support for preemption. AT&T urged the Commission to occupy the field when preventing slamming in the interstate market and to preempt conflicting state laws in the local market.¹⁸ Frontier urged the Commission to affirmatively preempt state substantive regulation of slamming while permitting the state commissions to enforce Commission rules designed to prevent such anticompetitive behavior.¹⁹ CWI strongly suggests the Commission examine and adopt these preemption proposals. While the Commission has demonstrated the capability of preventing anticompetitive behavior on the interstate level, the state commissions are just now facing a significant level of these problems in the interstate market as the ILECs are attempting to retain market share through such means as PIC freezes and commercial inducements in LOAs. Preemption would allow the states to dedicate their limited resources to exclusively combat anticompetitive behavior in the intrastate arena.

V. CONCLUSION.

CWI supports the Commission's efforts to eliminate slamming and provide appropriate remedies for those parties harmed due to an illegal PC change. The Commission's application of its rules to the local market is needed as the ILECs prepare to defend their dominant status in this soon to be competitive market. CWI also supports the Commission's bright line test to determine

¹⁸ AT&T at 36.

¹⁹ Frontier at 8.

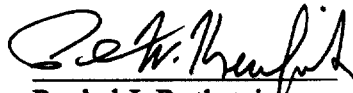
subscriber reliance for underlying carriers as well as the Commission's definitions of submitting and executing carriers, with some modifications. Additionally, CWI strongly suggests the Commission consider the preemption proposals suggested in the Comments which would not only create uniform rules for interstate services but would conserve the resources of the state commissions for actual and probable anticompetitive behavior the intrastate market.

While CWI supports the scope of the Commission's PC change rules, it strongly disagrees with certain elements of this rule. Specifically, the Commission's proposals for premium reimbursement, requiring the unauthorized carrier be made responsible for the previously authorized carrier's collection costs, and providing the consumer with the options to refuse or delay payment for services received would all create disincentives and incentives not envisioned by Congress. Adoption of these proposals could potentially have an adverse effect on the Commission's efforts to prevent illegal PC changes.

Respectfully Submitted,

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September 29, 1997